No. 84-1015

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Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHNNIE K. GOODSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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21 pp

QUESTIONS PRESENTED

1. Whether the government was precluded from interrogating petitioner when petitioner had requested counsel during detention but before he was advised of and waived his *Miranda* rights and before the initiation of custodial interrogation.

2. Whether petitioner knowingly and intelligently waived his right to counsel after receiving *Miranda* warnings prior to custodial interrogation.

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OPINIONS BELOW

The opinion of the United States Court of Military Appeals (Pet. App. 1a-23a) is reported at 18 M.J. 243. The opinion of the United States Army Court of Military Review (Pet. App. 24a-29a) is reported at 14 M.J. 542.

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on July 23, 1984. A petition for reconsideration was denied on November 2, 1984 (Pet. App. 30a). The petition for a writ of certiorari was filed on December 26, 1984. The jurisdiction of this Court is invoked under Section 10(a)(1) of the Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1405 (to be codified at 28 U.S.C. 1259(1)).

STATEMENT

Pursuant to his pleas of guilty, petitioner, a member of the United States Army, was convicted by a military judge

sitting as a special court-martial convened by the Commanding General, U.S. Army Test and Evaluation Command, Aberdeen Proving Ground, Maryland, of possessing and using marijuana, in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934. Contrary to his pleas of not guilty, petitioner also was convicted of attempting to possess, transfer, and use amphetamines, in violation of Article 80, UCMJ, 10 U.S.C. 880. He was sentenced to a bad conduct discharge, confinement at hard labor for three months, forfeiture of $334 pay per month for three months, and reduction to Private E-1. The convening authority reviewed the case pursuant to Article 60, UCMJ, 10 U.S.C. 860, and approved the findings and sentence. The United States Army Court of Military Review likewise affirmed the findings and sentence (Pet. App. 24a-29a). Upon discretionary review pursuant to Article 67(b)(3), UCMJ, 10 U.S.C. 867(b)(3), the United States Court of Military Appeals also affirmed (Pet. App. 1a-23a).

1. Evidence developed at a suppression hearing showed that during the early morning of February 28, 1981, petitioner and eight other service members were apprehended by Military Police Sergeant Faron R. Slye for possession of marijuana and other controlled substances on the Aberdeen Proving Ground military reservation (Pet. App. 2a, 4a; Tr. 15-16). After a search of petitioner's clothing revealed the presence of marijuana and the other suspected dangerous drugs, he was handcuffed and, along with the other suspects, transported to the Military Police Investigation (MPI) office (Pet. App. 4a; Tr. 15-17). There, petitioner was released from his handcuffs and detained with the other suspects to await questioning by Investigator Dennis T. Allinder, the only Military Police Investigator on duty at the time (Pet. App. 3a, 4a-5a; Tr. 20).

Approximately 15 minutes after arriving at the MPI office, petitioner informed Sergeant Slye, the arresting officer, that "he didn't want to make a statement" and "requested a lawyer" (Pet. App. 5a; Tr. 23). Sergeant Slye responded that he would relay the request to Investigator Allinder (*ibid.*). Some time later, while Sergeant Slye was obtaining data concerning petitioner's name, rank, social security number, and date and place of birth, petitioner again requested counsel (Pet. App. 5a, 16a; Tr. 25). About two hours later, petitioner requested counsel again (Pet. App. 5a; Tr. 26). On these occasions, Sergeant Slye again told petitioner that he would inform Investigator Allinder of petitioner's request, and Sergeant Slye later testified that he did so (Pet. App. 2a-3a; Tr. 23-26). Investigator Allinder, however, testified that he did not recall anyone having informed him that petitioner wanted to see an attorney (Pet. App. 3a; Tr. 31, 34-35).

The military judge found, in accordance with petitioner's own testimony, that Sergeant Slye told petitioner that he should not make any statements or sign anything until his rights were read to him by Investigator Allinder (Pet. App. 3a-4a, 5a; Tr. 88-89, 132-133). The military judge also found that, while waiting to see Investigator Allinder, petitioner "was told that he could not see a lawyer at that time and that the on-duty [legal] officer could not be called by [petitioner]" (*ibid.*).

At approximately 12 noon, nine hours after petitioner's apprehension, Investigator Allinder, who had first interviewed six of the other suspects apprehended along with petitioner, interviewed petitioner (Pet. App. 3a-5a; Tr. 36). Investigator Allinder began the session by fully advising petitioner of his rights as required by Article 31(b), UCMJ, 10 U.S.C. 831(b), and *Miranda* v. *Arizona,* 384 U.S. 436 (1966). Petitioner initialed and signed a form signifying that he wished to waive his right to counsel and that he was

willing to discuss the offenses (Pet. App. 3a & n.1, 5a; Tr. 31-35; GX 1). He then made incriminating oral statements concerning his attempted possession, use, and transfer of amphetamines (Tr. 34).

The following day, petitioner was interviewed by his company commander. After she prefaced the interview with the proper warnings, petitioner again waived his right to counsel and agreed to discuss the offenses. He then gave another inculpatory statement concerning the contested charges. The following day, the commander made arrangements for petitioner to consult with counsel, although petitioner had never asked her to do so. Tr. 55-65.

Petitioner testified that he did not request counsel when Investigator Allinder advised him of his rights because he "didn't think [he would] get one" and "[b]ecause it was already denied to me, two or three times" (Pet. App. 4a; Tr. 90). However, petitioner also testified that, after listening to the other suspects' admissions to Investigator Allinder, he realized that "[t]hey already knew everything" (*ibid.*). He further testified that he did not request counsel when interviewed by his commanding officer on the following day because he "thought [he] was already hung * * * [and] didn't stand a chance because they already knew" (Pet. App. 4a; Tr. 91).

2. The military judge rejected petitioner's argument that his statement to Investigator Allinder was obtained in violation of his right to counsel (Pet. App. 4a; Tr. 135). After making specific findings of fact,[1] the military judge reasoned (Pet. App. 6a):

> [Petitioner's] initial request for a lawyer * * * was not made at a time when he had full knowledge of his rights

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[1]The military judge's findings of fact are set out in the decision of the court below (Pet. App. 4a-6a).

> and was not due to any interrogation whatsoever. It is not uncommon for one arrested to want to see a lawyer, but the state of the law does allow the government to inform the accused of his rights and then ask if he understands them. Once ascertaining the suspect understands his rights, the next question is to whether he wants a lawyer present. [Petitioner] had his opportunity at that point when questioned by Agent Allinder to state that he did want an attorney and that would require the government to suspend any further questioning. In this case [petitioner], after being informed of his rights completely and for the first time * * *, consciously elected not to demand a lawyer and waived his rights. Therefore the statement taken by MPI Agent Allinder was voluntarily and intelligently given by [petitioner] with full knowledge of his rights.

Both petitioner's statement to Investigator Allinder and his subsequent statement to his company commander were admitted into evidence (Pet. App. 26a). In addition to petitioner's confessions, the government presented independent evidence of the offenses. That evidence showed that, at the time of petitioner's apprehension, he was in possession of marijuana and various capsules that proved to be stimulants (Tr. 154, 159, 176; GX 7).

3. The United States Army Court of Military Review rejected petitioner's claim that his confessions should have been suppressed under *Edwards* v. *Arizona,* 451 U.S. 477 (1981), because they were obtained after he had requested the assistance of counsel. The court reasoned that "[t]he prohibition in Edwards is aimed at attempts by authorities 'to *reinterrogate* an accused in custody if he has clearly asserted his right to counsel' " and that the "Fifth Amendment right to counsel identified in *Miranda* does not grant an accused a right to confer with or have counsel immediately upon apprehension and before questions eliciting an

incriminating response are put to him" (Pet. App. 26a-27a (citation omitted)). The court therefore concluded that "the *Edwards* 'bright line' was not transgressed by the police" (Pet. App. 27a).

The United States Court of Military Appeals also held that petitioner's suppression motion was properly denied. Writing the lead opinion for the court, Judge Cook concluded that *Edwards* was distinguishable. He noted that, unlike the situation in *Edwards,* petitioner made his requests for counsel while the case was still in the investigatory stage and before he had been advised of his *Miranda* rights or subjected to any interrogation (Pet. App. 9a). Observing that under *Miranda* and its progeny the right to appointed counsel does not attach until custodial interrogation has begun, Judge Cook concluded that the "corollary is that a waiver of the *Miranda* rights cannot occur unless there has been a full advisement of rights" (Pet. App. 10a).[2]

Chief Judge Everett dissented (Pet. App. 15a-23a). In his view, the distinction relied upon by Judge Cook between pre-interrogation requests for counsel and those made after interrogation has commenced was unsupported by *Edwards* and *Oregon* v. *Bradshaw,* No. 81-1857 (June 23, 1983) (Pet. App. 21a).

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[2]Judge Fletcher concurred in the result for the reasons set forth in his opinion in *United States* v. *Hill,* 5 M.J. 114, 117 (CMA 1978) (see Pet. App. 15a). In *Hill,* Judge Fletcher had dissented from an opinion written by Judge Cook excluding a confession because the defendant's request for counsel following a reading of *Miranda* rights and prior to reinterrogation nine hours later was not " 'scrupulously honored' " (5 M.J. at 116). In dissent, Judge Fletcher stated that, in his view, the government had met its burden of showing that the defendant had intelligently waived his right to counsel because, inter alia, after requesting counsel but before asking to discuss the case with an investigator, he learned that one of his co-suspects had made a statement implicating him (*id.* at 118).

ARGUMENT

The decision of the United States Court of Military Appeals is correct and does not conflict with any decision of this Court or of any other court of appeals; indeed, it does not appear that any other appellate court has considered the *Edwards* issue raised by petitioner. In addition, petitioner failed to preserve his alternative claim that his waiver of the right to counsel was involuntary. Accordingly, further review is not warranted.

1. Relying upon *Edwards* v. *Arizona,* 451 U.S. 477 (1981), which was decided by this Court subsequent to petitioner's interrogation,[3] and *Miranda* v. *Arizona,* 384 U.S. 436 (1966), petitioner contends (Pet. 5-9) that the failure of the military police to honor his requests for counsel during his pre-interrogation detention precluded a finding of a valid waiver of his right to counsel once interrogation began. This claim was properly rejected by all three courts below. As those courts correctly recognized, petitioner's right to counsel simply had not attached at the time that he made his requests to Sergeant Slye, because he had not yet been subjected to any custodial interrogation. Accordingly, the rule announced in *Edwards,* precluding *re*interrogation following a request for counsel, or a finding of a valid waiver of that right absent initiation by the

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[3]Petitioner argues (Pet. 9-11) that *Edwards* should be applied to this case even though the decision was announced after his interrogation by the military police. Subsequent to the filing of the petition, this Court held that *Edwards* does indeed apply retroactively to cases still pending on direct review at the time of the decision. *Shea* v. *Louisiana,* No. 82-5920 (Feb. 20, 1985). As we demonstrate in this brief, however, petitioner is asking the Court to extend *Edwards* to a new situation. Whether such an extension is appropriate raises no question of retroactivity. See *Michigan* v. *Tucker,* 417 U.S. 433, 452-453 n.26 (1974). And even if the Court were to disagree with our submission that *Edwards* does not govern the instant case, review still would be inappropriate for the additional reasons set forth at pages 14-15, *infra.*

defendant of a conversation with the police, is inapplicable to this case. Moreover, the extension of *Edwards* urged by petitioner would produce a result bearing no relationship to the concerns that animated the *Edwards* decision in the first place.

a. In *Miranda,* the Court dealt with the "admissibility of statements obtained from an individual who is subjected to custodial police interrogation" and the inherent cocercion present during that process. 384 U.S. at 439. The Court concluded that protection of a suspect's Fifth Amendment right against self-incrimination required that custodial interrogation be preceded by advice to the suspect that he has the right, inter alia, to the presence of counsel during questioning. 384 U.S. at 471. The Court emphasized that the right not to be interrogated in the absence of counsel attaches at the point of interrogation because it is the "process of in-custody interrogation * * * [that] contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467.[4]

Edwards, in turn, merely established an additional prophylactic rule intended to ensure that the safeguards established by *Miranda* would not be eviscerated by police badgering. See *Oregon* v. *Bradshaw,* No. 81-1857 (June 23, 1983), slip op. 5 (plurality opinion). In *Edwards,* following the administration of the warnings required by *Miranda,* the accused voluntarily submitted to questioning but subsequently stated that he wished to consult with an attorney before the discussion continued. Nevertheless, the police

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[4]See also *Miranda,* 384 U.S. at 448 (in-custody interrogation is psychologically oriented); *id.* at 478 (Fifth Amendment privilege against self-incrimination is jeopardized when an individual "is taken into custody * * * and is subjected to questioning").

persisted in their questioning on the following day, informing the accused that "he had" to talk with them. 451 U.S. at 478-479. Concluding that the resulting confession was inadmissible because the defendant had not effectively waived his previously invoked right to counsel, the Court announced a bright line rule prohibiting the police from "further interrogation" of an accused once he invokes his right to counsel and requiring the accused to initiate further dialogue with the police as a prerequisite to a finding of a valid waiver of the right to be free from uncounseled interrogation.

Neither *Miranda* nor *Edwards,* therefore, supports the proposition that requests for counsel made prior to the commencement of the interrogation process prohibit the initiation of that process (which is commenced not by actual questioning but merely by the administration of the *Miranda* warnings) unless counsel has been provided or the suspect initiates a conversation with the police. Instead, *Miranda* identified the time at which the right to counsel attaches and efforts to conduct questioning must cease upon invocation of the right as the point when the suspect is advised of his rights and "is first subjected to police interrogation while in custody." *Miranda,* 384 U.S. at 477; *id.* at 444-445, 473-474. See *Rhode Island* v. *Innis,* 446 U.S. 291, 300 (1980) (procedural safeguards of *Miranda* "are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation"); *Escobedo* v. *Illinois,* 378 U.S. 478, 490-491 (1964) (right to consult with counsel attaches when "the suspect has been taken into police custody, [and] the police carry out a process of interrogations that lends itself to eliciting incriminating statements"). *Edwards,* in turn, simply "reconfirm[ed]" that, once the right to counsel is invoked by the suspect during custodial interrogation, the police cannot initiate efforts to "reinterrogate" him, and adopted a prophylactic

rule to enforce that prohibition against "further interrogation by the authorities." *Edwards,* 451 U.S. at 484-485. See also *Oregon* v. *Bradshaw*, slip op. 5 (rule in *Edwards* prohibits "further interrogation" once right to counsel is asserted by accused during custodial interrogation); *Wyrick* v. *Fields,* 459 U.S. 42, 45-46 (1982) (per curiam) (same).

That the *Edwards* rule applies only to situations of "further interrogation" or "reinterrogation" following the suspect's invocation of his right to counsel during or after the commencement of custodial interrogation is made clear by the final footnote of the opinion, in which the Court cautioned (451 U.S. at 487 n.10):

> We need not decide whether there would have been a valid waiver of counsel had the events of January 20 [the date of the "reinterrogation"] been the first and only interrogation to which Edwards had been subjected. Cf. *North Carolina* v. *Butler,* 441 U.S. 369 (1979).

Here, however, petitioner seeks to extend *Edwards* not merely to the first custodial interrogation that occurred in this case, but to a point in time that preceded the commencement of *any* custodial interrogation. It would, of course, be possible to apply the *Edwards* rule at virtually any point in time. For example, a person who expects to be arrested in the near future could advise the police that he will want counsel following his arrest. Under petitioner's reading of *Edwards,* the police would be precluded, upon arresting that person, from advising him of his *Miranda* rights in the absence of counsel or the initiation of communication with the police by the arrestee. Obviously, a line triggering the application of *Edwards* must be drawn

somewhere, and, as we have shown above, this Court has drawn it at the point of custodial interrogation.[5]

b. Because the prophylactic rule of *Miranda* is designed to act as a safeguard against the inherently compelling pressures found to be so often present during custodial interrogation (*Miranda,* 384 U.S. at 467), rather than the mere "subtle compulsion" resulting from the the fact of custody (cf. *Rhode Island* v. *Innis,* 446 U.S. at 303), limitation of the *Edwards* rule to requests for counsel made during or after the commencement of in-custody interrogation makes perfect sense. A suspect awaiting interrogation may decide, for any number of legitimate reasons, that he wishes to answer questions without counsel. To allow a request for counsel prior to the commencement of custodial interrogation to invalidate a waiver made once police-initiated interrogation begins would "deprive suspects of an opportunity to make informed and intelligent assessments

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[5]The Court's recent decision in *Smith* v. *Illinois,* No. 84-5332 (Dec. 10, 1984) (per curiam), is not to the contrary. In that case, the defendant, while being advised of his *Miranda* rights at the inception of interrogation, stated that a female acquaintance had advised him to obtain counsel and that he would "like to do that." Nevertheless, "[i]nstead of terminating the questioning," the police "proceeded to finish reading Smith his *Miranda* rights and then pressed him again to answer their questions." *Smith* v. *Illinois,* slip op. 2. Smith then responded "Yeah and no, uh, I don't know what's what, really" to a question whether he wished to speak without the presence of counsel. *Ibid.* He then admitted commission of the offense. Rejecting the analysis of the Illinois Supreme Court that ambiguous responses to further questioning cast doubt upon the initial clarity of Smith's request for counsel, the Court reiterated its holding in *Edwards* that the police cannot subject an accused to further interrogation once he expresses his desire to deal with the police only through counsel, absent the procurement of counsel or subsequent waiver of the request. *Smith,* slip op. 6-9. Nothing in *Smith* suggests that requests for counsel during detention but prior to the commencement of any interrogation preclude the police from giving *Miranda* warnings and obtaining a valid waiver when they are ready to commence interrogation.

of their interests." *Michigan* v. *Mosley*, 423 U.S. 96, 102 (1975).[6] At the same time, invocation of the right to counsel prior to custodial interrogation should not confer "permanent immunity from * * * interrogation, regardless of the circumstances," lest "the *Miranda* safeguards [be transformed] into wholly irrational obstacles to legitimate police investigative activity" (*ibid.*).

In this case, each of petitioner's requests for counsel was made to Sergeant Slye during the preliminary stages of the investigation and well before the time that he was "first subjected to police interrogation while in custody at the station." *Miranda*, 384 U.S. at 477.[7] Sergeant Slye's responses to petitioner's requests bore none of the hallmarks of police "badgering" that animated the *Edwards*

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[6]Although *Mosley* dealt with the invocation of the right to silence during custodial interrogation, "much of the logic and language of the opinion could be applied to the invocation of the [right to counsel]." *Solem* v. *Stumes*, No. 81-2149 (Feb. 29, 1984), slip op. 10.

[7]Petitioner notes (Pet. 2, 7) that one of his requests for counsel was made while Sergeant Slye was conducting "administrative questioning" — the process of obtaining administrative data concerning the suspect such as his name, rank, and social security number. But as Chief Judge Everett observed in his dissent (Pet. App. 21a), questions concerning such "neutral subjects" do not constitute interrogation within the meaning of the Fifth Amendment or Article 31, UCMJ, 10 U.S.C. 831. Questioning of this type is not interrogation within the meaning of *Miranda* because an essential ingredient of interrogation is "words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island* v. *Innis*, 446 U.S. at 301 (footnotes omitted). See, *e.g.*, *Escobedo* v. *Illinois*, 378 U.S. at 491 (right to counsel attaches at the "process of interrogations that lends itself to eliciting incriminating statements"); *United States* v. *Booth*, 669 F.2d 1231, 1238 (9th Cir. 1982) (routine gathering of background biographical data ordinarily not custodial interrogation under *Miranda*); *United States* v. *Foskey*, 636 F.2d 517, 522 n.3 (D.C. Cir. 1980); *United States ex rel. Hines* v. *LaVallee*, 521 F.2d 1109, 1112-1113 (2d Cir. 1975), cert. denied, 423 U.S. 1090 (1976).

decision. See *Oregon* v. *Bradshaw*, slip op. 5. Instead, Sergeant Slye told petitioner that "he should not make any statements and sign anything until his rights were read to him by the MPI Agent" (Pet. App. 5a; see also Tr. 88). Moreover, on each occasion that petitioner requested counsel, Sergeant Slye told him that he would relay the request to Investigator Allinder. Under these circumstances, all that petitioner had to do when Investigator Allinder read him his rights was assert that he did in fact want counsel, as he had previously told Sergeant Slye.[8] That he did not do so suggests not that the police engaged in improper behavior designed to overcome petitioner's will, but rather that petitioner had changed his mind. This conclusion is borne out by the findings of the United States Army Court of Military Review (see Pet. App. 29a) that petitioner waived his right to counsel because he realized that the "cat was already out of the bag" by virtue of his confederates' statements at the time Investigator Allinder commenced interrogation. See page 15, *infra*. Nothing in *Edwards* or its progeny was intended to prevent an accused from waiving his right to counsel in these circumstances.[9]

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[8]As earlier noted, Investigator Allinder testified that he did not recall being advised that petitioner had requested counsel. The discrepancy between Sergeant Slye's testimony and Investigator Allinder's was never resolved by the courts below, but that discrepancy is irrelevant to the legal question here, because our position does not depend on any claim that Investigator Allinder was ignorant of petitioner's pre-interrogation statements. Moreover, because the interrogation antedated *Edwards*, it seems unlikely that Investigator Allinder would have thought that a prior request for counsel could disable petitioner from agreeing to submit to interrogation.

[9]In his dissent (Pet. App. 20a), Chief Judge Everett errs in stating that holding *Edwards* inapplicable to this case renders petitioner's pre-interrogation requests for counsel and the resulting conduct of the police "immaterial." As the United States Army Court of Military Review correctly observed (Pet. App. 27a), these factors must be considered "to determine whether, at the time of questioning, the suspect's waiver was knowing and intelligent." That inquiry, of course, is entirely distinct from the question of the applicability of the presumption created by *Edwards*. See pages 14-15 & note 11, *infra*.

c. At all events, the question whether *Edwards* applies to the instant case does not warrant this Court's review at this time. Petitioner cites no case — federal, state, or military —that has addressed the issue of the effect of a pre-interrogation request for counsel. So far as we are aware, the issue simply has not arisen before. It would thus appear that the factual situation presented by this case is not a recurring problem. And, if it does recur, further analysis by the lower courts would be beneficial before this Court considers the issue. See, *e.g., United States* v. *Mendoza,* No. 82-849 (Jan. 10, 1984), slip op. 6; *E.I. du Pont de Nemours & Co.* v. *Train,* 430 U.S. 112, 135 n.26 (1977).

2. Petitioner also claims (Pet. 11-13) that even if Investigator Allinder lawfully initiated custodial interrogation, petitioner's waiver of the right to counsel was neither knowing nor voluntary. But the fact-bound issue of the voluntariness of petitioner's waiver of the right to counsel is not properly before this Court because petitioner did not raise it in any of the courts below.[10] It therefore cannot be raised for the first time in this Court. See, *e.g., United States* v. *Lovasco,* 431 U.S. 783, 788 n.7 (1977).[11] In any event, this

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[10]At trial, the sole basis for petitioner's motion to suppress his confessions was that his requests for counsel were not "scrupulously honored." Tr. 105; see also Tr. 125-126, 130; Def. Br. 1-2. When, during the suppression hearing, the prosecutor attempted to introduce evidence bearing on the knowing and voluntary nature of the waiver, petitioner's attorney objected on the ground that it was irrelevant. The military judge then terminated the line of questioning. Tr. 105-106. Petitioner's arguments in both the United States Army Court of Military Review and the Court of Military Appeals also focused exclusively on the question whether Investigator Allinder's interrogation violated *Edwards* and did not address the question whether, in the absence of a violation of *Edwards,* his waiver of the right to counsel was knowing and voluntary.

[11]Petitioner's belated attempt to challenge the voluntariness of his waiver is particularly inappropriate because "[i]nvocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together." *Smith* v. *Illinois,* No. 84-5332 (Dec. 10, 1984), slip op. 7 (footnote omitted).

fact-bound claim is without merit. The military judge made a sua sponte determination that "the statement taken by MPI Agent Allinder was voluntarily and intelligently given by [petitioner] with full knowledge of his rights" (Pet. App. 6a). Thereafter, the United States Army Court of Military Review, exercising its factfinding powers under Article 66(c), UCMJ, 10 U.S.C. 866(c), and relying upon petitioner's own testimony during the suppression hearing, found that petitioner waived his right to counsel at the inception of Investigator Allinder's questioning because of his belief that Investigator Allinder "already knew everything" as the result of the interrogation of a co-accused and that petitioner was "attempting to make the best out of a bad situation rather than acting on the belief that counsel would be denied him upon his timely request" (Pet. App. 29a). These concurrent factual determinations plainly do not warrant further review by this Court. See, *e.g.*, *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 8; *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1985

1985-03
DOJ-19